

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ET AL.,

PLAINTIFFS

v.

CASE NO.: 05-cv-329-GKF(SAJ)

TYSON FOODS, INC., ET AL.,

DEFENDANTS

**RESPONSE OF TYSON FOODS, INC., TYSON CHICKEN, INC.,
TYSON POULTRY, INC., AND COBB-VANTRESS, INC. TO STATE OF
OKLAHOMA'S MOTION TO EXPAND THE DISCOVERY PERIOD AND
INTEGRATED BRIEF IN SUPPORT THEREOF**

The Court should deny Plaintiffs' motion to expand the discovery period (Dkt. # 1418). Plaintiffs have requested that this Court require each of the defendants to produce documents pre-dating the discovery period previously defined by this Court. Plaintiffs' motion is pointless as it relates to Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., and Cobb-Vantress, Inc. ("Tyson") because Tyson has not applied a temporal distinction in producing documents to Plaintiffs. Tyson has already produced (or made available for inspection and copying) the documents Plaintiffs seek. As the motion relates to other defendants, Plaintiffs have failed to show the relevance of any documents created more than five years ago, presenting this Court with only broad allegations of relevance rather than actual evidence of the relevance of specific documents. Therefore, Plaintiffs failed to satisfy the burden imposed upon them by this Court to justify expanding the discovery period.

I. Because Tyson Imposed No Temporal Restriction on Its Document Production, Plaintiffs' Motion Does Not Apply to Tyson

Over the past two and a half years, Tyson has affirmatively produced to Plaintiffs more than 100,000 pages of responsive documents relating to its operations in the Illinois River

Watershed (“IRW”).¹ These documents include, but are not limited to, contract grower files and electronically stored information regarding poultry operations which pertain to all persons whom Tyson has identified as contracting with one of the Tyson defendants for the raising of poultry in the IRW. Tyson produced all documents in its possession that were required for Tyson’s Rule 26(a) initial disclosures or that were responsive to Plaintiffs’ discovery requests, regardless of the date of creation. For example, Tyson produced the following reports which pre-date the relevant time period, as defined by this Court.

<u>Report</u>	<u>Complex</u>	<u>Date</u>	<u>Bates Range</u>
Grower Master Download	Springdale and Noel	1998 – April 2007	TSN107974SOK – TSN107985SOK
Cost of Hens Sold Report with fiscal year-to-date summary	Springdale	1994 – April 2007	TSN107986SOK – TSN108154SOK
Grower Pay Spreadsheet	Noel	1998 – 2006	TSN108155SOK – TSN108982SOK
Grower Pay Spreadsheet	Springdale	1998 – 2006	TSN108983SOK – TSN111043SOK
Fiscal Year Sold Hen Statistics	Noel	1998 – September 2007	TSN111069SOK – TSN111114SOK; TSN111167SOK – TSN111184SOK; TSN119579SOK – TSN119629SOK
Cobb Sold Pullet Flocks Statistics	Cobb-Vantress	1996 – August 2007	TSN116813SOK – TSN116834SOK
Cobb Sold Bates Flocks	Cobb-Vantress	1996 – August 2007	TSN116835SOK – TSN116891SOK
Cobb Sold Hen Statistics	Cobb-Vantress	1996 – August 2007	TSN116892SOK – TSN116937SOK

Additionally, with respect to individual growers, Tyson produced documents created prior to the five-year limitations period to the extent that Tyson’s grower files contained such

¹ Tyson complied with this Court’s order of July 6, 2007, by producing all corporate documents responsive to Plaintiffs’ numerous discovery requests without regard to the date of creation.

documents. For example, with respect to the following growers, Tyson produced contracts executed in the 1980's: Ed Gonzales – 12-18-88 and 10-18-89; Joyce Graves – 11-12-86; Bill Curran – 10-1-84; Don and Carolyn Umberson – 8-13-87; and Green Acres – 11-1-85. *See* Collective Exh. 1, documents produced herein and Bates numbered TSN00553SOK – TSN00554SOK; TSN00556SOK; TSN01109SOK – TSN01110SOK; TSN23093SOK – TSN23094SOK; TSN099294SOK; and TSN099573SOK – TSN099574SOK. Among the responsive financial documents Tyson produced for individual growers are the following Monthly Broiler Cost by Grower reports: Katie Grimsley – January 1, 1983; Roy Grimsley – March 31, 1984; and Randy West – August 27, 1983. *See id.*, TSN01471SOK; TSN01842SOK; TSN25840SOK. Additionally, Tyson produced Flock Transfer Registers for IRW growers located in the Springdale complex for the period from 1998 through 2006. *See id.*, TSN87430SOK – TSN87488SOK; TSN87803SOK – TSN87982SOK; TSN111186SOK – TSN111806SOK. For IRW growers located in the Noel complex, Tyson produced Flock Transfer Registers for the period from 2001 through 2006. *See id.*, TSN87489SOK – TSN87802SOK; TSN119480SOK – TSN119578SOK.²

On April 10, 2007, Tyson offered to make available for inspection and copying more than two hundred and fifty boxes of historical contract grower files and operations records from its Noel and Springdale complexes.³ *See* Collective Exh. 2, correspondence between M. Bond and R. Garren. These boxes include documents dating back to at least 1972. On August 8, 2007,

² This list of documents does not include all documents created prior to the five-year limitations period which Tyson produced to Plaintiffs. Rather, it is a representative listing of such documents provided as a means of illustration for the Court.

³ Any contract grower files relating to Tyson contract growers located in the IRW which Tyson did not affirmatively produce to Plaintiffs as relating to persons contracting with Tyson for the raising of poultry prior to five-year limitations period were made available to Plaintiffs for inspection and review through this offer.

Plaintiffs accepted Tyson's offer, and in November 2007, Plaintiffs reviewed and inspected eighty-two boxes of documents from the Noel complex. *See id.* At the conclusion of that inspection, Plaintiffs made copies of documents contained in sixty-three of those boxes. *See* Collective Exh. 3, Document Check Out Sheets. To date, Plaintiffs have not inspected the more than 200 boxes of documents from Tyson's Springdale complex.

Because Tyson did not impose a temporal limitation upon its document production, Plaintiffs' motion to expand the discovery period does not apply to Tyson. Quite simply, Tyson has either produced or made available for inspection all files in its possession of which it is aware and which have been located to date relating to contract growers and Tyson's operations in the IRW. Therefore, the Court should not grant Plaintiffs' motion and order further production of documents with respect to Tyson.

II. Plaintiff Have Not Demonstrated the Necessity of Expanding the Discovery Period Defined by the Court

It is well settled that discovery requests must be limited to a reasonable time period. If discovery requests are not so limited, they are facially overbroad, and the party seeking discovery bears the burden of proving relevance. *See Williams v. Sprint/United Mgmt. Co.*, 2006 U.S. Dist. LEXIS 69051 (D.Kan. Sept. 25, 2006). This Court has recognized that principle in entering its July 6, 2007 and October 24, 2007 orders and holding that, to justify expansion of the discovery period, Plaintiffs must demonstrate the relevance to the current condition of the IRW of poultry litter applications occurring in the distant past. *See* July 6, 2007 Order (Dkt. # 1207) and October 24, 2007 Order (Dkt. # 1336).

In attempting to meet the requirements set forth by this Court, Plaintiffs broadly assert that all documents relating to poultry operations and poultry litter handling practices in the IRW are relevant to issues of past and present environmental injuries, damages, and relief, regardless

of their age. As evidence of the relevance of documents created more than five years prior to the filing of this suit and the ensuing need to expand the discovery period, Plaintiffs offer the following: (1) an affidavit regarding the effects of “chicken waste application in the distant past,” (2) their Second Amended Complaint, which seeks relief for past as well as present conduct, and (3) an Oklahoma statute providing that the duration of misconduct is a factor in determining punitive damages. None of these three pieces of “evidence” satisfies the requirement of this Court that Plaintiffs must provide “extensive briefing on the legal issues presented and expert testimony on the impact of chicken waste application in the distant past upon the current condition of the watershed.” July 6, 2007 Order (Dkt. # 1207). Because Plaintiffs fail to sufficiently demonstrate the actual relevance of any specific documents and the need for expanding the discovery period beyond the five years previously imposed by this Court, the Court should deny their motion.

A. The Affidavit Submitted by Plaintiffs Does Not Demonstrate the Relevance of Discovery Beyond the Five-Year Limitations Period

Plaintiffs submit the affidavit of Shanon Phillips, an employee of the Oklahoma Conservation Commission, in an effort to support their claim that the application of poultry litter more than five years ago adversely impacted the condition of the IRW at the time and continues to affect the condition of the IRW. Ms. Phillips’ affidavit does not satisfy the Court’s requirement that Plaintiffs must demonstrate the relevance of documents created beyond the five-year limitation period. Rather than demonstrating the effect of the land application of poultry litter on historical or current water quality, Ms. Phillips’ affidavit is, in effect, a summary of Plaintiffs’ overall claims in this action, as it focuses on general water quality in the IRW and makes only broad allegations that poultry litter negatively affects water quality.

The affidavit does not demonstrate the relevancy of any particular documents created beyond the five-year limitations period. In no way does Ms. Phillips' affidavit establish, or even partially support, the idea that any specific documents relating to Tyson's operations in the IRW are actually relevant as required by the Court's July 6, 2007 Order.

B. Plaintiffs' Second Amended Complaint Does Not Satisfy the Court's Requirement of a Showing that Documents Beyond the Five-Year Limitations Period Are Relevant

Plaintiffs contend that because their Second Amended Complaint seeks relief for past as well as present conduct, they are entitled to unlimited discovery of all documents regardless of age. In making this contention, Plaintiffs lose sight of what is really at issue with respect to their motion. Plaintiffs argue that the statute of limitations does not run against a government entity acting in its sovereign capacity to enforce a public right and that this exception applies to the State of Oklahoma. Plaintiffs then extend this argument and assert that the statute of limitations places no bar on discovery by the State in this action.

Plaintiffs' characterization of the statute of limitations as extending the relevant discovery period is simply incorrect. Plaintiffs cite *State v. Tidmore*, 674 P.2d 14 (Okla. 1983) and *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131 (Okla. 1988) for the propositions that the State may bring a cause of action to enforce a public right despite the lapse of an otherwise applicable statute of limitations and that evidence relating to the conduct of the defendants beyond the five-year limitations period is relevant.⁴ However, these cases do not grant the State the right to discover information pertaining to a period of time beyond the

⁴ Whether or not the exception to the statute of limitations applies in this action to allow Plaintiffs to pursue claims for pre-2002 conduct of the defendants is not presently at issue. In fact, the Court issued its previous order on the relevant discovery period without rendering a decision on the statute of limitations and its effect on Plaintiffs' ability to pursue certain claims. See July 6, 2007 Order, p. 3 [DKT. #1207].

limitations period specified by the Court. To the contrary, the law is well settled that a district court has broad discretion to define the scope of discovery and to deny discovery when materials are overly burdensome to produce, when production of the materials may delay the case, or when the materials are less relevant to the matters at issue. *See, e.g., King v. PA Consulting Group, Inc.*, 485 F.3d 577, 590 (10th Cir. 2007); *Cruces v. Utah State Veterans Nursing Home*, 222 Fed.Appx. 776, 781, 2007 WL 901946 (10th Cir., March 27, 2007); *Gaines v. Ski Apache*, 8 F.3d 726, 730 (10th Cir. 1993) (“The trial court has broad discretion regarding its control of discovery, and we will find that discretion to have been abused only when a denial of discovery precludes a fair trial.”) (Internal quotation marks and citation omitted.). The Federal Rules’ “desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant.” *Gomez v. Martin Marietta Corp.*, 50 F.3d 511, 1520 (10th Cir. 1995).

This Court should not be misled into expanding the discovery period based upon Plaintiffs’ erroneous portrayal of *Tidmore* and *HTB, Inc.* or the simple fact that Plaintiffs have pled claims relating to conduct beyond the five-year limitations period. Neither constitutes actual evidence of the relevance of any particular document beyond the five-year limitations period.

C. The Mere Fact That Plaintiffs Have Claimed Punitive Damages Does Not Justify Extending the Discovery Period Beyond the Five-Year Limitations Period

Plaintiffs also argue that information relating to poultry operations in the IRW more than five years ago is relevant on the issue of punitive damages. Plaintiffs specifically argue that under 23 Okla. stat. tit. § 9.1(A)(3) a jury may award punitive damages based in part upon “the duration of the misconduct.” However, Plaintiffs fail to demonstrate that any specific documents

are relevant to their punitive damages claim; in fact, to date, Plaintiffs have produced no evidence establishing that they are entitled to punitive damages at all.

The fact that Plaintiffs have requested punitive damages certainly does not constitute conclusive evidence of the relevance of any documents beyond the five-year limitations period. In effect, this Court has already found this fact to be insufficient evidence of such relevance. At the time that this Court issued its July 6, 2007 Order, requiring Plaintiffs to present additional evidence of relevance to justify the expansion of the discovery period, Plaintiffs had already asserted their claim for punitive damages in both their Complaint and First Amended Complaint. *See* Complaint (filed June 18, 2005), ¶ VI (5); First Amended Complaint (Dkt. # 18-1), ¶ VI (5). Plaintiffs have not provided any evidence to show how any specific documents are relevant to determining the existence of punitive damages and therefore have not met the burden imposed by this Court to demonstrate an actual need for an expanded discovery period.

III. Conclusion

Aside from the fact that Tyson has produced responsive documents without regard to the date of creation, which renders Plaintiffs' motion irrelevant to Tyson, Plaintiffs clearly have not presented this Court with the proof necessary to support an expansion of the discovery period. Even if Tyson had taken a more restricted approach to producing documents, Plaintiffs have not satisfied this Court's requirement that they must prove the relevance of documents outside of the previously defined discovery period. Plaintiffs are familiar with the types of documents in Tyson's and other defendants' possession relating to operations in the IRW, yet they do not articulate how any of these documents, created during an expanded time period, are relevant to their claims. After reviewing and analyzing the more than 100,000 pages of documents produced by Tyson in this action and the great volume of documents produced by other

defendants, Plaintiffs are unable or unwilling to explain the probative value of documents relating to a broader discovery period. Plaintiffs clearly are not entitled to an expansion of the discovery period. Therefore, this Court should deny Plaintiffs' motion for expansion of the discovery period.

Respectfully submitted,

KUTAK ROCK LLP

By: /s/ Michael R. Bond
Michael R. Bond, appearing *pro hac vice*
Erin Thompson, appearing *pro hac vice*
The Three Sisters Building
214 West Dickson Street
Fayetteville, AR 72701-5221
(479) 973-4200 Telephone
(479) 973-0007 Facsimile

-and-

Stephen Jantzen, OBA #16247
Patrick M. Ryan, OBA # 7864
RYAN, WHALEY & COLDIRON
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102
(405) 239-6040 Telephone
(405) 239-6766 Facsimile

-and-

Thomas C. Green, *appearing pro hac vice*
Mark D. Hopson, *appearing pro hac vice*
Timothy K. Webster, *appearing pro hac vice*
Jay T. Jorgensen, *appearing pro hac vice*
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
(202) 736-8000 Telephone
(202) 736-8711 Facsimile

Attorneys for Defendants,
Tyson Foods, Inc., Tyson Chicken, Inc.,
Tyson Poultry, Inc., and Cobb-Vantress, Inc.

CERTIFICATE OF SERVICE

I certify that on the 21st day of March 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General
J. Trevor Hammons, Assistant Attorney General
Tina L. Izadi, Assistant Attorney General
Daniel P. Lennington, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us
trevor_hammons@oag.state.ok.us
tina_izadi@oag.state.ok.us
daniel.lennington@oag.ok.gov

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
Joseph P. Lennart
David P. Page
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

doug_wilson@riggsabney.com
driggs@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
jlennart@riggsabney.com
dpage@riggsabney.com

J. Randall Miller
Louis W. Bullock
MILLER KEFFER BULLOCK PEDIGO LLC

rmiller@mkblaw.net
lbullock@bullock-blakemore.com

Frederick C. Baker
Lee M. Heath
William H. Narwold
Elizabeth C. Ward
Elizabeth Claire Xidis
Ingrid L. Moll
Jonathan D. Orent
Michael G. Rousseau
Fidelma L. Fitzpatrick
MOTLEY RICE, LLC

fbaker@motleyrice.com
lheath@motleyrice.com
bnarwold@motleyrice.com
lward@motleyrice.com
cxidis@motleyrice.com
imoll@motleyrice.com
jorent@motleyrice.com
mrousseau@motleyrice.com
ffitzpatrick@motleyrice.com

COUNSEL FOR PLAINTIFFS

A. Scott McDaniel
Nicole Longwell
Philip D. Hixon
Craig A. Mirkes
MCDANIEL HIXON LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mwsgw.com

R. Thomas Lay
KERR, IRVINE, RHODES & ABLES

rtl@kiralaw.com

David G. Brown
Jennifer S. Griffin
LATHROP & GAGE, L.C.

dbrown@lathropgage.com
jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
YOUNG WILLIAMS P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
Jennifer E. Lloyd
THE OWENS LAW FIRM, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com
jlloyd@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Woody Bassett
BASSETT LAW FIRM

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
wbassett@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
D. Richard Funk
P. Joshua Wisley
CONNER & WINTERS, PLLC

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
dfunk@cwlaw.com
jwisley@cwlaw.com

COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker
Colin H. Tucker
Theresa Noble Hill
Leslie J. Southerland
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com
chtucker@rhodesokla.com
thill@rhodesokla.com
ljsoutherland@rhodesokla.com

Terry W. West
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
Dara D. Mann
Todd P. Walker
FAEGRE & BENSON LLP

dehrich@faegre.com
bjones@faegre.com
kklee@faegre.com
dmann@faegre.com
twalker@faegre.com

COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

/s/ Michael R. Bond
Michael R. Bond